

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-2089

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JOSEPH WILSON,

Petitioner-Appellant,

-against-

WALTER FOGG, Superintendent, Green :
Haven Correctional Facility, :

Respondent-Appellee. :
-----X

DOCKET NUMBER 77-2089

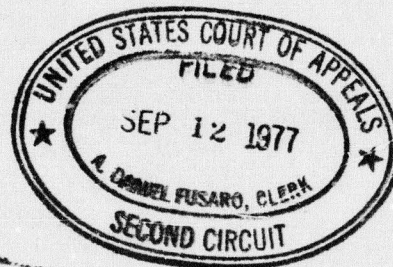
=====

BRIEF FOR PETITIONER-APPELLANT

=====

AMANDA POTTERFIELD
PIERCE GERETY, JR.
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Petitioner-Appellant
100 Church Street - 18th Floor
New York, New York 10007
(212) 285-0370

DATED: New York, New York
September 12, 1977



77-2089

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JOSEPH WILSON,

Petitioner-Appellant,

-against-

WALTER FOGG, Superintendent, Green :
Haven Correctional Facility, :

Respondent-Appellee. :
-----X

DOCKET NUMBER 77-2089

BRIEF FOR PETITIONER-APPELLANT

AMANDA POTTERFIELD
PIERCE GERETY, JR.
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Petitioner-Appellant
100 Church Street - 18th Floor
New York, New York 10007
(212) 285-0370

DATED: New York, New York
September 12, 1977

TABLE OF CONTENTS

Table of Cases	i,ii,iii
Table of Authorities	iii
Questions Presented	1
Statement of the Case	2
Prior Proceedings	2
Statement of Facts	3
Decisions Below	14
Argument	
I. The trial court's decision to proceed in appellant's absence, and the sub- sequent trial <u>in absentia</u> , while appel- lant was in custody in lieu of bail and effectively without assistance of counsel, violated the Sixth and Fourteenth Amend- ments to the United States Constitution	16
Introduction	16
A. The trial court was required to obtain an express personal waiver from appellant, who was in custody, before proceeding to trial in his absence	21
B. Assuming that a waiver of the right to be present at trial can be implied where the accused is in custody, no knowing and intelligent waiver appears in the record of this case	34
C. A competence examination was required to insure a valid waiver of presence at trial under the due process clause of the Fourteenth Amendment to the United States Constitution.	46

D. Even if a waiver of the right to be present at trial can be implied where the accused is in custody, and even if no competence examination were required to determine appellant's competence to waive a fundamental right, the trial court abused its descretion in proceeding to trial in absentia. 52

Conclusion 54

TABLE OF CASES

Brady v. United States, 397 U.S. 742 (1970)	19
Brewer v. Williams, ____ U.S. ____, 97 S.Ct. 1232 (1977)	19
Carnley v. Cochran, 369 U.S. 506, 514 (1962)	45
Cross v. United States, 325 F.2d 629 (D.C.Cir. 1963)	20,24,26
Cureton v. United States, 396 F.2d 671 (D.C.Cir. 1968), affirmed after remand, 413 F.2d 418 (D.C.Cir. 1969)	38
Curry v. Estelle, 531 F.2d 766 (5th Cir. 1976)	52
Diaz v. United States, 223 U.S. 442 (1912)	17,20,39, 51
Faretta v. California, 422 U.S. 806 (1975)	18
Fay v. Noia, 372 U.S. 391 (1963)	26
Government of Virgin Islands v. Brown, 507 F.2d 186 (3rd Cir. 1975)	39,40
Hopt v. Utah, 110 U.S. 574 (1884)	17,43
Humphrey v. Cady, 405 U.S. 514 (1972)	26
Illinois v. Allen, 397 U.S. 337 (1970)	17,26
Johnson v. Zerbst, 304 U.S. 458 (1938)	19,21,25, 45,52
Lewis v. United States, 146 U.S. 370 (1892)	17,39,43, 44
Pate v. Robinson, 383 U.S. 375 (1966)	48
People v. Anderson, 16 N.Y.2d 282 (1965)	43
People v. Epps, 37 N.Y.2d 343 (1975), cert. denied, 423 U.S. 999 (1976)	17,28,29, 30,31
People v. Peterson, 40 N.Y.2d 1014 (1976)	48
People v. Wilson, 51 A.D.2d 1105, leave to appeal denied, 39 N.Y.2d 842 (1946)	2,14

Sailer v. Gunn, 548 F.2d 271 (9th Cir. 1977)	51
Seiling v. Eyman, 478 F.2d 211, 214 (9th Cir. 1973)	49
Snyder v. Massachusetts, 291 U.S. 97 (1934)	17,18
State v. Tacon, 107 Ariz. 353, 488 P.2d. 973 (1971), writ of certiorari dis- missed as improvidently granted, 410 U.S. 351 (1973)	38,39
Tacon v. Arizona, 410 U.S. 351 (1973)	19,39
Taylor v. United States, 414 U.S. 17 (1973)	20,34,53
United States v. Clark, 475 F.2d 240 (2d Cir. 1973)	42
United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969)	20,22,23,24, 26,42,44
United States v. David, 511 F.2d 355 (D.C.Cir. 1975)	48
United States v. Gregorio, 497 F.2d 1253 (4th Cir.), cert. denied, 419 U.S. 1024 (1974)	18
United States v. Partlow, 428 F.2d 814 (2d Cir. 1970)	38
United States v. Pastor, Dkt. Nos. 76-1634 & 1423, slip. op. 3633 (2d Cir. May 19, 1977)	35,38
United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied sub nom. Smith v. United States, 424 U.S. 925 (1976)	39,40,53
United States v. Plattner, 330 F.2d 271 (2d Cir. 1964)	19
United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973)	43
United States v. Saddler, 531 F.2d 83 (2d Cir. 1976)	50
United States v. Taylor, 478 F.2d 689 (1st Cir.), affirmed 414 U.S. 17 (1973)	34

United States v. Toliver, 541 F.2d 958 (2d Cir. 1976) . . .	44,52
United States v. Tortora, 464 F.2d 1202 (2d Cir.), cert. denied sub nom. Santoro v. United States, 409 U.S. 1063 (1972)	20,34,38,39, 42,52,53
United States ex rel. Curtis v. Zelker, 466 F.2d 1092 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973)	48,51
United States ex rel. Konigsberg v. Vincent, 526 F.2d 131 (2d Cir. 1975), cert denied, 426 U.S. 937	50
United States ex rel. Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975)	32
United States ex rel. Roth v. Zelker, 455 F.2d 1105 (2d Cir.), cert. denied, 408 U.S. 927 (1972)	48, 51
Westbrook v. Arizona, 384 U.S. 150 (1966)	49
Wilcox v. United States, 425 F.Supp. 895 (D.Conn. 1975)	26

STATUTES

New York Criminal Procedure Law §195.20	27
New York Criminal Procedure Law §220.50	27
New York Criminal Procedure Law §260.20	17,24,26,43
New York Criminal Procedure Law §320.10	27
New York Criminal Procedure Law §340.50	28
New York Criminal Procedure Law §730.30	50

OTHER AUTHORITIES

Comment, Criminal Waiver: The Requirement of Personal Participation, Competence and Legitimate State Interest, 54 Calif. L. Rev. 1262 (1966)	27
Fed. R. Cr. P. 43	24,39
Fed. R. Evid. 201(b)	25
8 Moore's Federal Practice ¶43.02	39

QUESTIONS PRESENTED

- I. WHETHER THE TRIAL COURT'S DECISION TO PROCEED WITH TRIAL IN THE ABSENCE OF APPELLANT, WHO WAS IN CUSTODY IN LIEU OF BAIL, AND EFFECTIVELY WITHOUT ASSISTANCE OF COUNSEL, VIOLATED APPELLANT'S RIGHTS TO BE PRESENT AT HIS TRIAL AND TO CONFRONT THE WITNESSES AGAINST HIM GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
 - A. Whether the Court was required to obtain an express, personal waiver from appellant, who was in custody, before proceeding to trial in his absence.
 - B. Assuming that a waiver of the right to be present at trial can be implied where the accused is in custody, whether a knowing and intelligent waiver appears in the record of this case.
 - C. Whether the trial court was required to grant the motion for a competence examination to insure a valid waiver of appellant's right to presence at trial.
 - D. Even if a waiver of the right to be present at trial can be implied where the accused is in custody, and even if no competence examination were required to determine appellant's competence to waive a fundamental right, whether the trial court abused its discretion in proceeding to trial in absentia.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

Appellant Joseph Wilson was tried and convicted in absentia before the Hon. Morris Spector and a jury in New York Supreme Court, New York County in December, 1972. On March 15, 1973, Mr. Wilson was sentenced to concurrent terms of five to fifteen years for burglary and two and one-third to seven years for robbery. His conviction was affirmed without opinion by the Appellate Division, First Department. 51 A.D.2d 1105 (1976). The New York Court of Appeals denied leave to appeal. 39 N.Y.2d 842 (1976).

Appellant then petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus, claiming that the trial court's decision to proceed to trial in his absence, while he was in custody in lieu of bail, violated his rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The petition was considered on the merits and dismissed by the District Court (Owen, J.), in a memorandum and order dated June 17, 1977.

Notice of Appeal was filed on July 1, 1977, and Judge Owen granted a certificate of probable cause, which was filed July 11, 1977.

STATEMENT OF FACTS

The trial of Joseph Wilson began in his absence on December 7, 1972, and continued in his absence through December 11, 1972. During this period and since his arrest in August, 1972, Mr. Wilson was in custody in lieu of bail in the Manhattan House of Detention. The "Tombs," as it is known, is located across the street from the New York City Civil Court Building at 111 Centre Street, where the case was tried.

THE FIRST DAY, Thursday, December 7, 1972

Mr. Wilson was not present in the courthouse on the morning of December 7, 1972, the first day of his trial.¹ The Hon. Morris Spector, to whom the case had been referred for trial, instructed assigned defense counsel, Alexander Dreiband, assistant district attorney Heller, the clerk of court and the stenographer to go across the street to the Tombs to talk to Mr. Wilson (A. 22).²

1. The record does not indicate at what point a date of December 7, 1972, was set for Mr. Wilson's trial. The last court appearance scheduled in the case had been December 4, 1972, before the Hon. Ivan Warner, at which time the assistant district attorney moved the case for trial. However, no minutes exist for that court appearance, which was abruptly terminated, and there is no indication when Justice Spector set a date of December 7, 1972.

2. Numbers in parentheses preceded by "A" refer to those minutes of the pre-trial hearing, trial and sentencing which are reproduced in the Appendix.

Neither Mr. Dreiband, Mr. Heller, the court clerk nor the stenographer saw Mr. Wilson or talked to him that morning. Mr. Dreiband's report to the court was that he had not gone to the cells and had not presented himself to see Mr. Wilson as his attorney, but that an "assistant warden" told them that Mr. Wilson had said it was his religious holiday, and that he would not come downstairs to the conference room from his cell (A. 26). Mr. Heller reported that "my correction captain" had informed them that Mr. Wilson would not come down to the conference room (A. 22).

The unidentified person or persons working at the Tombs who did see Mr. Wilson that morning never were called to court and did not testify. Neither Mr. Dreiband nor Mr. Heller reported that they instructed the Tombs personnel to tell Mr. Wilson that his trial was to begin that day. Justice Spector's instructions to the messenger party as to what to advise Mr. Wilson were not taken down by the court reporter contemporaneously, but are available through the judge's subsequent restatement of his instructions for the record.

[Appellant] was notified this morning that the district attorney and his counsel were present, they wanted to discuss his appearance in court today and informed him that the judge had instructed them that he appear in court today, . . .

(A. 27-28)

After Mr. Dreiband and Mr. Heller had made their report to the court about their visit to the Tombs, assistant district attorney Heller suggested that the court either have Mr. Wilson produced with the use of reasonable force or proceed in absentia. (A. 22).

Mr. Dreiband's response to the suggestion that the trial proceed in appellant's absence was that, in his opinion, the conduct of his client indicated the need for a competence examination before proceeding further (A. 22-23). In support of his motion for a competence examination, Mr. Dreiband recounted the history of his representation of Mr. Wilson.

Mr. Dreiband had been appointed to represent Mr. Wilson in late October, 1972, after the Legal Aid attorney had been relieved at Mr. Wilson's request. On November 2, 1972, Mr. Dreiband requested a month's adjournment to prepare the case. Mr. Dreiband's recollection was that Joseph Wilson had not been produced in court on November 2, and was certain that, if Mr. Wilson were there, they had had no conversation (A. 25-26).

By December 7, the first day of trial, Mr. Dreiband had conversed with appellant only once, on December 4, 1972 (A. 25-26). At that time, Mr. Wilson threatened Mr. Dreiband, directed him to file writs for other inmates at the Tombs, stated that he believed that he (Mr. Wilson) was God, and that he did not want Mr. Dreiband to represent

him (A. 23-24). Mr. Wilson told Mr. Dreiband that he wanted to represent himself (A. 24).

Mr. Dreiband described to the court the setting of this one conversation, which had taken place sometime during a scheduled court appearance before the Hon. Ivan Warner, on December 4, 1972³ (A. 26). Mr. Wilson had yelled at a court attendant when the attendant touched him, and the proceedings were disrupted. Justice Warner left the bench, and Mr. Wilson was removed from the courtroom (A. 26_/

Assistant district attorney Heller had also witnessed the events of December 4. His opinion was that Mr. Wilson was "malingering" since he had "absolutely no psychiatric history." (A. 24-25).

Other evidence of erratic behavior before the court on December 7 were Mr. Wilson's statements about his religious beliefs. Mr. Wilson had told Mr. Dreiband that he (Mr. Wilson) was God (A. 23). Justice Spector previously had received word that Mr. Wilson was observing Channukah, a Jewish holdiay. Assistant district attorney Heller had been told that morning that Mr. Wilson was celebrating a Muslim holiday. Mr. Wilsons' pedigree sheet indicated that he had stated his religion to be Protestant when he was arrested in August, 1972 (A. 27).

3. The court appearance of December 4, 1972, before Justice Warner, who was not the trial justice, was the last time that Joseph Wilson was in court until he was sentenced on March 15, 1973.

Justice Spector did not grant the motion for a competence examination. The court did not ask that the unidentified corrections official(s), who were the only people who had spoken to Mr. Wilson at all that day, testify as to their conversations. Nor did the court request defense counsel, Mr. Dreiband, to advise his client personally with a view to obtaining a written waiver reflecting that Mr. Wilson was aware that his trial would begin and continue in his absence. Nor did Justice Spector inquire about the feasibility of using reasonable force to bring Mr. Wilson into court, an alternative which had been suggested by assistant district attorney Heller.

The court did order that the trial proceed without Mr. Wilson:

THE COURT: I think that this defendant has an opportunity to come in to court to try his case. He was notified this morning that the district attorney and his counsel were present, they wanted to discuss his appearance in court today and informed him that the judge had instructed them that he appear in court today, and he has chosen not to appear. So I think we will proceed without him.

(A. 27-28)

The only basis in the record for the court's conclusion that Mr. Wilson was informed that he was to appear in court that morning is the double hearsay report that Mr. Wilson told unidentified corrections official(s) that he would not go down to a conference room from his cell in the Tombs,

nor to court, and that it was his religious holiday. There is no basis in the record for the proposition that Mr. Wilson was informed that his trial was to begin that morning, and the trial court's statement indicates that the trial court was not acting on that premise.

The trial began and continued in absentia. During the first morning, December 7, 1972, a motion for a Wade hearing into the circumstances of the show-up was denied on the papers for lack of sufficient factual allegations warranting a hearing (H. 11-12).⁴

However, a hearing was held, and evidence taken, on a motion to suppress a five dollar bill seized from Mr. Wilson at the time of his arrest (H. 14-22). The motion was denied (H. 24).

Before the court recessed for lunch, Justice Spector and Mr. Dreiband agreed that, since Mr. Wilson had not waived his right to trial by jury, a jury would have to be selected that afternoon (H. 24).

Although the lunch recess lasted nearly two and one-half hours, no person connected with the trial made any attempt to communicate with Mr. Wilson during that time (A. 31). No inquiry was made when the court reconvened

4. Numbers in parenthesis preceded by "H" refer to minutes of the pre-trial hearing which were not reproduced in the Appendix. Numbers preceded by "T" refer to minutes of the trial which were also not reproduced in the Appendix.

late in the day, at 3:12 p.m., as to whether Mr. Wilson was aware that selection of jurors would take place that afternoon, nor whether he would appear that afternoon or the following day.

Thus, a jury was selected and sworn Thursday afternoon, while Joseph Wilson sat in his cell across the street.

At the end of the day, the court stated that the defendant would be directed to appear the next morning. Justice Spector expressly rejected a request by assistant district attorney Heller that Mr. Wilson be advised that the case was in trial, and that the trial would proceed. Moreover, Mr. Dreiband declined to act as liaison between the court and his client.

THE COURT: The defendant will be directed to show up here tomorrow morning. The defendant will be directed to show up here tomorrow morning at 10:00 o'clock.

MR. HELLER (District Attorney): Could the defendant be informed by someone that the case is actually on trial, that the trial will proceed.

MR. DREIBAND (Defense Counsel): By whom? I wouldn't want --

THE COURT: No, he is directed to come here.

MR. DREIBAND: That is the Court's order. He will become more stubborn if somebody tells him what to do and won't come at all.

(A. 38)

THE SECOND DAY, Friday, December 8, 1972

Mr. Wilson came from the Tombs to the courthouse on the second day of trial, and was placed in a detention cell on

the ninth floor of 111 Centre Street, one floor below the courtroom. Mr. Dreiband had spoken to his client that morning in the detention cell, and summarized that conversation for the court, saying that Mr. Wilson wanted him "to continue trying the case" (A. 39). However, Mr. Wilson refused to come to court in handcuffs claiming that would be a violation of his constitutional rights. The conversation, their second and final conversation, ended when Mr. Wilson said to Mr. Dreiband: "You are not my lawyer anymore" (A. 39-40).

The court did not inquire further, but ordered the trial to continue. The People presented their case all that day. The court made no inquiry after the lunch recess or at the end of the day about any communication to or from Mr. Wilson, nor whether he had been advised of the trial proceedings, nor whether he wanted to be present.

THE THIRD DAY, Monday, December 11, 1972

When court reconvened on Monday morning, after the weekend recess, no mention was made of Mr. Wilson by the court or defense counsel.

There had been no effort by any person in the courtroom to communicate with Mr. Wilson during the two-day recess.

The prosecution completed its case that Monday morning (T. 143).

No defense was presented.

THE PROSECUTION CASE

The People's only direct evidence against Joseph Wilson was the identification testimony of the complainant, Mrs. Geary. Mr. Wilson had been brought to Mrs. Geary's apartment shortly after she had reported that a man had entered her apartment, had sexual intercourse with her⁵ and took a five dollar bill from her purse (T. 43-45). Mrs. Geary had identified Mr. Wilson at that show-up (T. 43). During the trial, Mrs. Geary identified a photograph of Mr. Wilson as a picture of "the defendant" (T. 38). She had been shown the photograph before trial in the District Attorney's office (T. 39-40).

Office McClelland testified that he had told Mrs. Geary at the show-up:

Something to the effect of we believe we have the defendant, would you look at the gentleman, please, and see if you remember him . . .

(T. 143)

5. Mr. Wilson was never indicted for rape. However, the complainant, who was 67 years old, testified without objection as to the alleged sexual intercourse (T. 35). The assistant district attorney reminded the jury of the alleged rape in summation (T. 156). The judge referred in his charge to the complainant's testimony about sexual penetration and then cautioned the jury to draw no inference from such testimony since there was no rape charge in the indictment (T. 190). The assistant district attorney reminded the court of the rape at sentencing (A. 53).

Circumstantial evidence linking Mr. Wilson to the crime was a five-dollar bill, seized along with three tens and thirteen singles, at the time of his arrest (T. 6-8), and testimony by police officers that he had been arrested several blocks from the scene shortly after the crime was reported, wearing clothes of the same colors as had been described by Mrs. Geary (T. 80, 119).

THE JURY

The court never gave any cautionary instructions on the absence of the defendant, but rather told the jurors before voir dire and during the charge simply that Mr. Wilson "chose" not to be present during the trial (A. 33; T. 180). The district attorney referred in his summation to Mr. Wilson's absence over objection:

. . . in a sense it is good the defendant is not here because really what he looks like and his background has nothing to do with your determination.
(T. 167)

Only defense counsel warned the jury not to speculate as to Mr. Wilson's absence (T. 25, 146).

During deliberations, the jury requested re-instruction on the elements of robbery, and a reading of the testimony of the complainant about what had been said during the robbery (T. 201).

A guilty verdict was returned Monday afternoon (T. 205).

No communication to or from Mr. Wilson had occurred since the previous Friday morning.

SENTENCING

Justice Spector saw Joseph Wilson for the first time at sentencing, three months after trial, when Mr. Wilson was forcibly produced without incident (A. 49). Alvin Geller, Esq., had been appointed after the death of Mr. Dreiband to represent Mr. Wilson at sentencing. Mr. Wilson stated that he had never been informed that a trial was in progress (A. 50, 55). Mr. Geller and Mr. Wilson moved for a hearing to determine whether there had been a valid waiver of the right to be present at trial (A. 46, 55).

Justice Spector's response was that Mr. Wilson had been "advised of every proceeding and every move made in this trial" (A. 47). There is no support in the trial minutes for this statement, and, indeed, Justice Spector cites as support only that Mr. Dreiband had gone to the Tombs the morning of trial and that Mr. Dreiband had seen Mr. Wilson the second day of trial. (A. 47).

Mr. Wilson denied ever having been told that a trial was to begin or was in progress (A. 50, 55).

The court refused to hold a hearing and sentenced Mr. Wilson forthwith to concurrent terms of five to fifteen years for second degree burglary and two and one-third to seven years for third degree robbery (A. 59), each

term being the maximum permissible under New York Penal Law §70.00(2) and (3).

DECISIONS BELOW

Trial counsel objected to the Assistant District Attorney's proposal to the trial court that the trial be held in absentia, stating that a competence examination of appellant was required before proceeding further. The trial court (Hon. Morris Spector) made no findings of fact, but simply stated that appellant had "an opportunity to come in to court to try his case" and had chosen not to appear.

At sentencing, newly appointed defense counsel moved for a hearing on the issue of waiver on the ground that appellant had never been informed that his trial was to begin or had begun. The trial court denied the motion, stating, without support in the record, that appellant "was advised of every proceeding and every move made in this trial."

The Appellate Division, First Department, affirmed appellant's conviction without opinion. 51 A.D.2d 1105 (1976). The New York Court of appeals denied leave to appeal. 39 N.Y.2d 842 (1976).

The memorandum and order here appealed from frames the case in two issues:

- 1) did appellant voluntarily absent himself from his trial knowing it was to start on December 7, 1972; and

2) did the trial judge have a duty to have appellant brought physically into the courtroom to waive his right to be present at trial.

Memorandum and Order, p.1, (A. 5). Judge Owen held that, although it would have been preferable for the trial judge to have had appellant brought physically into court for an express waiver, such a practice was not required under the circumstances of this case. Memorandum and Order, p. 15, (A. 19). As to the implied waiver, Judge Owen held that appellant deliberately decided not to appear in court despite the instructions of the trial judge, and that his absence was therefore voluntary. Memorandum and Order, p. 10, (A. 14). Further, Judge Owen held that in light of a disruption in a courtroom caused by appellant three days before the first day of trial and a statement by his assigned counsel on the second day of trial, it was clear that appellant knew that December 7, 1972, was the day for trial. Memorandum and Order, p. 13, (A. 17). Judge Owen's decision as to the propriety of the trial court's denial of the motion for a competence examination was that because there was no evidence before the trial court of a history of mental disturbance, and because the trial court concluded that appellant's behavior was an attempt to disrupt the judicial process, the issue is without merit. Memorandum and Order, p. 1, n. 1, (A. 5).

ARGUMENT

I. THE TRIAL COURT'S DECISION TO PROCEED IN APPELLANT'S ABSENCE, AND THE SUBSEQUENT TRIAL IN ABSENTIA, WHILE APPELLANT WAS IN CUSTODY IN LIEU OF BAIL AND EFFECTIVELY WITHOUT ASSISTANCE OF COUNSEL, VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

INTRODUCTION

Joseph Wilson was tried and convicted by a jury which was told that Mr. Wilson "chose not to appear" and which heard the prosecution's case while Mr. Wilson sat in a cell across the street from the courthouse. Mr. Wilson's "representative" in the courtroom was assigned defense counsel, whose representation had been rejected by Mr. Wilson, who had spoken to Mr. Wilson only once before the first day of trial, and who had refused to go to Mr. Wilson's cell to advise him that his trial was about to begin in his absence. Mr. Wilson's expressed desire to represent himself and his subsequent refusal to acquiesce in the representation of assigned counsel, led to a trial in absentia, and a conviction which seems to Mr. Wilson to have been the product of a joint effort among the trial judge, the assistant district attorney and assigned defense counsel.

Historically, presence of the accused at trial was deemed a requisite to jurisdiction of the criminal courts. As such, the right to presence was considered an absolute,

non-waivable right. See, e.g., Hopt v. Utah, 110 U.S. 574, 579 (1884); Lewis v. United States, 146 U.S. 370, 372 (1892); and historical discussion in People v. Epps, 37 N.Y.2d 343, 349 (1975), cert. denied, 423 U.S. 999 (1976). It is only with the comparatively recent development of the right to counsel that the courts established limited exceptions to the jurisdictional concept, holding that the accused may waive his right to be present by a voluntary failure to appear with actual notice of the commencement of trial or by misconduct in the courtroom.⁶ Diaz v. United States, 223 U.S. 442, 455 (1912); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Illinois v. Allen, 397 U.S. 337, 342-43 (1970).

However, the recent Supreme Court decision on the right to self-representation has revived the traditional, mandatory significance of the right to be present at trial and to personally defend oneself against the charges.

6. The New York statute implementing the Sixth Amendment right to presence is Criminal Procedure Law §260.20, which reads:

Jury trial; defendant's presence at trial.

A defendant must be personally present during the trial of an indictment; provided, however, that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct.

The proviso incorporating the misconduct exception to the right to be present was added in 1971, pursuant to Illinois v. Allen, 397 U.S. 337 (1970). Chapter 789 of the Laws of 1971. The otherwise mandatory language apparently has been interpreted to allow for waiver in some circumstances. People v. Epps, supra.

Faretta v. California, 422 U.S. 806 (1975). The Supreme Court in Faretta noted the historical premise of the right to be present, quoting from Snyder v. Massachusetts, supra, 291 U.S. at 106:

[I]t will be in [the accused's] power, if present, to give advice or suggestion or even to supercede his lawyers altogether and conduct the trial himself.

422 U.S. at 816. (Emphasis supplied by Court.)

The Faretta Court made it clear that the Sixth Amendment guarantees a personal defense at trial, and that the Constitution is not satisfied by a defense presented by counsel, particularly where counsel is not acceptable to the accused:

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.
(422 U.S. at 819)

In the instant case, assigned defense counsel informed the trial court on the morning of trial of appellant's wish to represent himself and of the fact that he, as counsel, had spoken to his client only once since his appointment. In this light, appellant's right to be present at his trial was the paramount Sixth Amendment right, without which no defense in the constitutional sense could be presented. United States v. Gregorio, 497 F.2d 1253, 1257, n.5 (4th Cir.), cert. denied, 419 U.S. 1024 (1974).

The trial judge was therefore under a particularly heavy duty to insure that a waiver of appellant's right to presence satisfy the always stringent standard set forth in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and Brady v. United States, 397 U.S. 742, 748 (1970). In order for appellant to have, by his absence and reported refusal to come to court, "intentionally relinquished a known right", he had to have known with certainty that his trial was to start on December 7, 1972, and that he had a right to be present. Johnson v. Zerbst, supra; see also Brewer v. Williams, _____ U.S. _____, 97 S.Ct. 1232, 1242 (1977). In addition, appellant must have been aware of "the relevant circumstances and likely consequences of his action;" that his trial would begin and end without him, with no defense and no opportunity to confront the witnesses against him; and that he indeed had a right to represent himself. Brady v. United States, supra; see also Tacon v. Arizona, 410 U.S. 351, 355 (1973), (Douglas, Brennan and Marshall, J.J., dissenting), and United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

Specifically with regard to the right to be present at trial, the courts have further defined the requirements for a valid waiver, depending on whether the absent defendant is in custody or at liberty on bail. Because a defendant in custody is incapable of the free volition

chargeable to those free on bail, his/her absence or refusal to appear in court is presumptively involuntary, even though it may be willed by the accused.⁷ The minimum requirement for a valid waiver of the right to be present at trial is therefore an express waiver on the record. Cross v. United States, 325 F.2d 629, 631 (D.C.Cir. 1963); United States v. Crutcher, 405 F.2d 239, 244 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969).

Waiver of the right to be present at trial can be implied only where it clearly appears from the record that a defendant at liberty, having actual notice of the commencement of trial, voluntarily fails to appear. Taylor v. United States, 414 U.S. 17 (1973); Diaz v. United States, 223 U.S. 442, 455 (1912); United States v. Tortora, 464 F.2d 1202 (2d Cir.), cert. denied, sub nom. Santoro v. United States, 409 U.S. 1063 (1972).

The trial court in this case, however, did find an implied waiver of appellant's right to be present, although appellant was in custody in the Tombs, and tried him in absentia. The District Court, upholding the action of the trial judge,

7. There is some authority for the proposition that an incarcerated defendant does not have the power to waive his right to be present at trial. Diaz v. United States, 223 U.S. 442, 455 (1912); United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969); Cross v. United States, 325 F.2d 629, 631 (D.C. Cir. 1963).

concluded that a voluntary and intelligent waiver could be implied from descriptions of appellant's behavior in prior court appearances, the reported refusal of appellant to come to court the morning of trial, and a statement by defense counsel to the court on the second day of trial. The District Court erred in reaching its decision, in that it failed to apply the requirements for waiver of the right to presence by an incarcerated defendant, and assumed the satisfaction of the Johnson v. Zerbst standard on the basis of a record which is ambiguous at best. A proper application of the relevant standards, discussed below, compels the conclusion that there was no voluntary, intelligent and competent waiver, but rather a reported refusal to appear by an accused isolated in his cell in the Tombs, where he remained, stubborn perhaps, but without the advice of counsel and in ignorance of the trial proceedings.

A. The trial court was required to obtain and express personal waiver from appellant, who was in custody, before proceeding to trial in his absence.

The issue presented is whether some form of express personal waiver by appellant was constitutionally required before the trial court proceeded to hear evidence on the motion to suppress evidence, to impanel a jury, to hear the prosecution case and summations, and to charge the jury

in the absence of appellant and while he was in nearby custody. Contrary to the statement of the issues in the decision of the District Court, it is not appellant's position that the trial court had a duty to have appellant produced by reasonable force. Rather, appellant submits that a range of alternatives providing safeguards of reliability for a waiver of appellant's right to be present was available to the trial court, and that its reliance on double hearsay and statements by the assistant district attorney and assigned defense counsel rather than an express personal waiver violated appellant's constitutional rights.

Thus, on this record, this Court is not required to decide whether the use of reasonable force is necessary to obtain an express waiver in open court, nor how much risk of injury or threat to security must be assumed to produce an accused in court. Nor is it a case which presents a question as to the kind of express, personal waiver which will meet constitutional standards, nor even whether the waiver must be written if not presented in open court. Indeed, this case can be decided by affirming this Court's ruling in United States v. Crutcher, 405 F.2d 239, 244 (1968), cert. denied, 394 U.S. 908 (1969), that some form of an express personal waiver of the right to be present is required where an absent defendant is in custody.

Mr. Payne, the co-defendant in Crutcher who was the subject of the ruling on waiver of the right to be present,

had been at liberty on bail until two days before his trial was scheduled to commence, when he was arrested in another jurisdiction on unrelated charges and under a fictitious name. On the morning of trial, the prosecutor's office was notified of Mr. Payne's arrest, but he was not produced until the following day. 405 F.2d at 242.

Mr. Payne's attorney expressly waived Mr. Payne's right to be present on the first day of trial, and Payne, himself, made no objection when he arrived for the second day. Id. at 242-43. This Court ruled that no waiver could be implied from the giving of a fictitious name or from Mr. Payne's failure to object when he was produced in court. Further, although there had been an express waiver by counsel on the record, this Court remanded for a hearing to determine whether there had been an agreement between the defendant and counsel and, if so, whether there had been an understanding waiver. Id. at 243-44. (Emphasis supplied).

The Crutcher decision further states that the "preferred practice" would be for the trial court to advise the defendant of his right to be present, and then, if the defendant wishes to waive his right, obtain an intelligent and competent waiver on the record. Id., at 244.

The first case which "even suggested that a defendant in custody, other than by escaping, can 'voluntarily ab-

sent' himself from his trial" was Cross v. United States, 325 F.2d 629, 631 (D.C.Cir. 1963), cited with approval in Crutcher, supra,⁸

The facts in Cross are similar to the instant case, although Cross was at least present during the beginning of his trial. He then declined to return to the courtroom from a holding cell adjacent to the courtroom. Defense counsel reported to the trial court that his client refused to talk to him and to come to the courtroom. The trial court continued in absentia, without questioning the defendant as to whether he waived his right to be present.

The District of Columbia Circuit Court of Appeals reversed, holding that where an in-custody defendant is available, he must be brought before the court, advised of his right to be present, and then, if the defendant desires, the court can obtain an "intelligent and competent" waiver on the record. Cross, supra, at 631.

The Cross decision placed this responsibility for assuring a valid waiver of the right to be present at trial squarely on the shoulders of the trial court, in-

8. Although both Cross and Crutcher involved federal defendants whose Sixth Amendment right to be present at trial is also provided for in Fed.R.Cr.P. 43(a), those decisions expressly invoke the constitutional right as well as the statutory provision. New York State has similarly implemented by statute the constitutional right to be present at trial. Criminal Procedure Law §260.20, quoted supra, n.6, p. 17.

woking the waiver standards and burden of proof established in Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

The District Court in this case also held that it would have been "the preferred course" for the trial judge to have had appellant produced physically for purposes of making an express waiver. Memorandum and Order, p. 12 (A. 16). However, the District Court also held that the circumstances of this case rendered the production of appellant unnecessary, relying upon the report that appellant had been disruptive before a judge other than the trial judge three days before the morning of trial and stating that, in any event, an express waiver was not necessary since appellant's "position is perfectly clear from everything else in the record, including his own statements to a responsible correction officer."⁹ Memorandum and Order, p. 15 (A. 19).

Needless to say, the incident of December 4, 1972, cannot be stretched to justify the trial court's decision on December 7th to proceed in absentia without producing appellant and obtaining an express waiver. Even if the incident had occurred before the trial judge himself,

9. The District Court's characterization of the unidentified corrections official(s) as "responsible" is an assumption of a fact which would not seem to be the kind of fact "not subject to reasonable dispute" so as to qualify for judicial notice. Fed. R. Evid. 201(b).

on the morning of trial, the trial court would have been required to personally warn and advise appellant of his rights before removing him from the courtroom and proceeding in his absence. Illinois v. Allen, 397 U.S. 337, 342-43; N.Y.C.P.L. §260.20.

The reliance of the District Court on the double hearsay statements,¹⁰ reported to have been made by appellant to an unnamed corrections official or officials who never appeared in court, is similarly misplaced. The waiver of a fundamental constitutional right must be personal and cannot be made without the acquiescence of the accused, even by counsel, much less by a prison guard through counsel. Humphrey v. Cady, 405 U.S. 514, 517 (1972); Fay v. Noia, 372 U.S. 391, 438-39 (1963). In United States v. Crutcher, supra, this court refused to accept the purported waiver of the right to be present at trial expressed in open court by counsel for the absent defendant, and that case was remanded for a hearing to determine whether the defendant had agreed to the waiver. 405 F.2d at 243-44; cf. Wilcox v. United States, 425 F.Supp. 895 (D.Conn. 1975). In Cross v. United States, supra, counsel's statement that his client refused to come to court was insufficient

10. The District Court accepts the double hearsay as having "sufficient indicia of reliability" in that appellant's assigned defense counsel was present when the corrections official(s) made the statements to assigned defense counsel and the assistant district attorney in the Tombs, and when the statements were reported to the court. [Memorandum and Order, p. 13, n.6 (A.17)]. However, the District Court seems to overlook the initial hearsay, the alleged conversation between appellant and the correction official(s) [or an envoy of the correction official(s)], which is of course the crucial communication for which the need for safeguards is the greatest.

to waive the defendant's right to be present. The necessity for a personal waiver by the defendant is particularly vital where the relationship between the accused and counsel is not one of trust, where there is no consultation between counsel and his/her client and where a fundamental right is involved. See Comment, Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest, 54 Calif. L. Rev. 1262, 1266-1281 (1966).

That the trial court may have acted in good faith in proceeding to trial in absentia on the basis of representations by corrections official(s), reported by counsel, does not in any way establish that appellant personally and knowingly waived his rights. Appellant has never asserted bad faith on the part of the trial court. Appellant does assert, however, that he was never informed by a guard, by defense counsel or anyone that his trial was to begin on December 7, 1972, and that he therefore could not knowingly waive his right to be present.

The trial court was not without guidance as to alternatives for obtaining an express, personal waiver from appellant, if indeed that is the course appellant would have taken had he been fully advised. The New York Criminal Procedure Law demonstrates a strong policy requiring that waivers of Sixth Amendment rights by felony defendants be express, personal and in open court.¹¹

11. See Criminal Procedure Law §220.50 requiring that a guilty plea to an indictment be entered in person, §195.20 requiring that waiver of an indictment be in writing and signed by the defendant in open court; and §320.10 requiring that waiver of a jury trial must be in writing and signed by the defendant in open court in the presence of the court, and with the approval of the court.

However, C.P.L. §340.50(2) permits a misdemeanor defendant to waive his right to be present at trial by filing a motion supported by a "written and subscribed statement by the defendant declaring that he waives his right to be personally present at the trial and authorizing his attorney to conduct his defense." Assuming, arguendo, that the trial court was not required to have appellant produced in court for an express waiver on the record, it is clear that, some other form of express, personal waiver should have been obtained.

The only other case known to appellant wherein a waiver of the right to be present at trial was implied from the refusal of an incarcerated defendant to come to court is a New York state case which illustrates the possibilities for insuring a valid waiver in circumstances far more difficult than those in the instant case. People v. Epps, 37 N.Y.2d 343 (1975), cert. denied, 423 U.S. 999 (1976). In that case, decided shortly before appellant's appeal reached the New York State Supreme Court Appellate Division, the defendant had been present during the first two days of trial, during jury selection and throughout the testimony of one of the two key witnesses for the prosecution. 37 N.Y.2d at 345. Thus, in Epps, the New York courts were not presented with the issue of the defendant's actual notice of the commencement of trial.

However, the voluntariness of the defendant's waiver in Epps, a requirement which ordinarily can be satisfied where the defendant is in custody only be an express waiver, was carefully established in Epps:

1) Epps apparently refused to come to court from the Brooklyn House of Detention the third morning of his trial, and the court adjourned until Epps did appear that afternoon, after having been personally advised by his lawyer who had spoken to him in his cell. Id., at 346.

2) The trial judge warned Epps in open court to appear the following morning, and that, if he were not present, the trial would continue without him. Id.

3) When Epps refused to leave his cell the following morning, the trial judge called a corrections official and heard sworn testimony as to a boycott of the courts by inmates, including Epps, in the Brooklyn House of Detention. Id.

4) The court directed the corrections official on the record to inform Epps that it would adjourn until Epps arrived, unless Epps did not intend to appear. The court did adjourn until that afternoon, when the corrections official reported that Epps still refused to appear, although he was physically able to do so. Id., at 346.

5) On the following morning, the corrections official again appeared in court to report on the boycott and on Epps' personal refusal to appear. The corrections official was instructed to call the House of Detention to have Epps informed that he could still appear. Id., at 347.

6) Epps' counsel gave sworn testimony as to his conversations and advice to his client, and his efforts and those of an inmate leader to persuade Epps to return to court. Id. There was no indication of a lack of trust or confidence between Epps and his counsel.

The record in the instant case, on the other hand, reveals none of the safeguards of voluntariness present in Epps, but rather tends to show that appellant's refusal to appear in court was not a free and uncoerced choice to, in effect, waive his right to trial.

Although he was available in very nearby custody, Mr. Wilson remained effectively isolated from every aspect of the proceedings which resulted in his present imprisonment. There is no indication that he received, at any time during the trial, advice or information which he could consider to be trustworthy. Even giving full credit to the purely hearsay statements in the minutes,

the only people who spoke to Mr. Wilson on the first day of trial were corrections official(s) who told him only that assigned counsel and the assistant district attorney were waiting in the conference room to talk to him, and that he was instructed to appear in court. That information would more likely give the impression of the advent of plea negotiations rather than trial to an incarcerated defendant who lacked confidence in assigned counsel.

In affirming the finding of waiver in Epps, the New York Court of Appeals, like this Court and the D.C. Circuit Court of Appeals before it, expressly ruled that the preferable procedure is to bring an incarcerated defendant into court with reasonable force to obtain an express waiver on the record. 37 N.Y.2d at 351. The "exceptional circumstances" under which this preferable procedure was not required in Epps was the existence of the court boycott by the inmates in the Brooklyn House of Detention, a boycott in which Mr. Epps was participating. In this context, a forced deliverance to court may have created an even more serious disturbance among the inmates, and therefore was not warranted. Id.

The instant case not only contains a serious question of the notice of the commencement of his trial, it does not contain any of the indicia of voluntariness of the waiver found in Epps, nor does it involve

any exceptional circumstances foreclosing the possibility of obtaining an express waiver in open court or some other form of personal express waiver with advice of counsel. Although the assistant district attorney had suggested to the trial court before trial that appellant could be produced with reasonable force, the court made no inquiry into the feasibility of this alternative. It seems that there was no serious risk in this procedure, particularly in light of the fact that appellant was finally produced for sentencing without incident. Nor was there any justification for failure to obtain a written waiver from the defendant in his cell, if appellant chose to waive his right to be present after advice by counsel. It is unthinkable that Mr. Dreiband's timidity about approaching Mr. Wilson or seeing him in his cell would excuse the court from its responsibility to ascertain that an intelligent and voluntary waiver has been made. On the contrary, this fact alone should have triggered further inquiry by the court. Mr. Wilson's absence from the courtroom might well have been the result of his lack of confidence in Mr. Dreiband and a perceived helplessness to change counsel or to represent himself. See United States ex rel. Martinez v. Thomas, 526 F.2d 750, 756 (2d Cir. 1975). If necessary, substitute counsel could have been employed for the limited purpose of advising appellant of his rights.

Joseph Wilson's absence from the courtroom during each of the three days of his trial, while in custody, effectively without counsel, and having evidenced such irrational and erratic behavior that his mental competence was in doubt, should reasonably have provoked the closest judicial scrutiny. Justice Spector's unavoidable obligation was to have Mr. Wilson personally advised and to ascertain whether his actions were voluntary. If there could have been an intelligent and knowing waiver in this case, Justice Spector was bound to obtain it from Joseph Wilson expressly and personally.

B. Assuming that a waiver of the right to be present at trial can be implied where the accused is in custody, no knowing and intelligent waiver appears in the record of this case.

This Court has held that, in order for a trial court to imply a waiver of the right to be present at trial, it must clearly appear in the record that the absent defendant "was advised when proceedings were to commence and that he voluntarily, knowingly and without justification, failed to be present at the designated time and place." United States v. Tortora, 464 F.2d 1202, 1209 (2d Cir.), cert. denied sub nom. Santoro v. United States, 409 U.S. 1063 (1972). That the absent defendant be at liberty on bail is a pre-requisite to an implied waiver of the right to be present at trial, since an express personal waiver is necessary where the defendant is in custody.¹² See Argu-

12. Apart from the requirement of an express personal waiver by a defendant in custody, the effect of the reality of custody on the validity of an implied waiver of the right to be present at trial is probably the most significant fact which was not addressed by either the trial court or the District Court. In United States v. Taylor, 478 F.2d 680, 692, affirmed, 414 U.S. 17 (1973), the First Circuit justified a waiver of the right to be present implied from the absence of a defendant free on bail stating, inter alia:

A defendant free on bail, and thus not in custody, is not subject to any direct coercion to waive his right to be present at trial.

The implied waiver decisions draw heavily on the obligations to appear in court imposed by the conditions of bail on an accused. Taylor v. United States, 414 U.S. 17, 20 (1973); United States v. Tortora, supra, 464 F.2d at 1208.

ment A, above. For that reason, none of the implied waiver cases discussed herein are truly analagous to the instant case. However, even applying the standard for waiver by a defendant at liberty on bail, this record falls far short of the clear proof necessary to establish a waiver of the right to be present at trial, which in this context, was the essential Sixth Amendment right.

Of course, the entire record, including events which occurred before and after the first day of trial, can be considered to determine whether appellant deliberately and voluntarily, with actual notice of the commencement of trial, waived his right to be present and to confront the witnesses against him. United States v. Pastor, Dkt. Nos. 76-1634 and 1423, slip op. 3633 (2d Cir. May 19, 1977). However, in Pastor, the record clearly revealed the facts and circumstances relied upon by the trial court in finding a waiver since the trial court developed the facts at a post-trial hearing and made findings of fact.

Where, as here, the record contains only descriptions of past events by the assistant district attorney and defense counsel, where no hearing was held and no decision rendered by the trial court to shed light on what events and reported actions were the basis for the implied waiver of the right to be present, and where the trial judge did not personally see appellant until sentencing three months after trial, the

probative value of past events diminishes, and statements for the record become increasingly unreliable.

The trial judge's decision to proceed in absentia seems to be based on the information which was to have been imparted to Joseph Wilson in the Tombs the morning of trial: that the assistant district attorney and assigned defense counsel wanted to discuss his court appearance and that the judge had instructed him to appear in court; and on the reported refusal of Mr. Wilson to appear.

In denying the motion for a hearing on the issue of waiver at sentencing, the trial judge stated that appellant had been "advised of every proceeding and every move in this trial", but supported that statement only by the fact that appellant's counsel had gone to the Tombs the morning of trial (but had not seen appellant there) and that counsel had seen appellant in the detention cell the second day of trial.

The District Court's conclusion that Joseph Wilson voluntarily absented himself from his trial, knowing that it was to begin on December 7, 1972, includes circumstances which may not have been decisive to the trial judge. The District Court decision cites as support for its holding:

Before the commencement of trial:

The assistant district attorney's description to the trial judge of an outburst by Mr. Wilson in another judge's courtroom on December 4, 1972, when the assistant district attorney moved the case for trial. [Memorandum and Order, p. 13 (A. 17)];

The trial judge's statement for the record that he had instructed Mr. Wilson to come to court the morning of December 7, 1972, and the assistant district attorney's and defense counsel's report to the trial court of the statement by an unidentified corrections official or officials that Mr. Wilson had said he could not go to court because it was his holiday (Id.);

The Second Day of Trial:

Defense counsel's description to the trial court of a conversation with Mr. Wilson that morning in which Mr. Wilson was reported to have told defense counsel to "continue trying the case," and then that he would not go to the courtroom in handcuffs since it would violate his constitutional rights, and then that defense counsel was "not his lawyer anymore." (Id.).

In opposition to the circumstances relied upon by the trial judge and the District Court,¹³ are the following facts which occurred in open court:

Defense counsel's uncontroverted statement the morning of the first day of trial that he had not gone to appellant's cell that morning to speak to him, and that, indeed, he had spoken to appellant only once since his appointment as counsel;

13. Understandably, the District Court did not rely on the statement by the trial judge at sentencing that Mr. Wilson had been "advised of every proceeding," since that statement is unsupported by the record. The District Court does refer to a prior court appearance, sometime before November 2, 1972, when Mr. Wilson reportedly asked that his Legal Aid attorney be relieved, and to Mr. Wilson's criminal record [Memorandum and Order, p. 11 (A. 15) and pp. 2 and 10 (A. 7 and 14)] as additional support for its conclusion that Mr. Wilson was engaging in disruptive tactics.

Defense counsel's opinion that appellant's actions evidenced psychiatric problems warranting a competence examination;

The trial judge's explicit rejection of the suggestion that appellant be told on the afternoon of the first day of trial that his trial was in progress and would continue;

Appellant's unequivocal assertion at sentencing that he had never been informed that his trial was about to begin.

Even in the context of defendants who are at liberty on bail and fail to appear, appellant knows of no other case in which a waiver of the right to be present at trial has been implied without a hearing, where, as here, the defendant claims his absence was involuntary and that he had no notice of the commencement of trial. See United States v. Partlow, 428 F.2d 814 (2d Cir. 1970); United States v. Pastor, supra; Cureton v. United States, 396 F.2d 671, 676 (D.C.Cir. 1968).

Until 1972, actual notice of the commencement of trial was not an issue in cases involving a waiver of the right to be present at trial by defendants on bail. Until this Court decided United States v. Tortora, supra, no court except the Arizona state courts¹⁴ had upheld a waiver of the

14. State v. Tacon, 107 Ariz. 353, 488 P.2d 973 (1971), writ of certiorari dismissed as improvidently granted, 410 U.S. 351 (1973). The defendant had voluntarily left the state pending trial, acknowledged receipt of notice of the trial date from his attorney, but did not have the funds to return to face the charges. The Arizona courts affirmed the conviction, and
(Continued on next page)

right to be present at trial unless the defendant had been present at least for the impanelment of the jury. 464 F.2d at 1208; See Fed.R.Cr.P. 43, which, re-stating the law on waiver of the right to be present as it was formulated by the Supreme Court in Lewis v. United States, 146 U.S. 370 (1892), and Diaz v. United States, 223 U.S. 442 (1912), provides only for waiver by a defendant who is present at the outset of trial and who later voluntarily absents himself. 8 Moore's Federal Practice ¶43.02(2), at 43-9 (2d ed. 1976).

Since Tortora, several other courts have also moved away from the initial appearance criterion for notice of the commencement of trial. See Government of Virgin Islands v. Brown, 507 F.2d 186 (3rd Cir. 1975); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied sub nom. Smith v. United States, 424 U.S. 925 (1976). In those cases, where the defendant at liberty on bail does not appear for the first day of trial, actual notice of the commencement of trial is an issue of fact, but remains a stringent requisite to a valid waiver of the right to be present at every stage of the trial proceedings. Hence, the facts upon which a finding of actual notice will be sustained must be clear and unambiguous. In Tortora, the defendant had

(Footnote continued from last page) . . .

the Supreme Court dismissed the writ of certiorari since the constitutional issue had not been presented to the state courts. Three Justices dissented to the dismissal of the writ, and would have reversed the conviction on the ground that the defendant's conduct did not meet the standards of waiver of a constitutional right. 410 U.S. at 355.

called his attorney on the eve of trial to arrange for a ride to court the following morning, but never appeared and, after trial, offered no justification for his absence. In Government of Virginia Islands v. Brown, the defendant was served with a subpoena notifying him of the date and precise time in the morning that his trial was to commence, but the defendant did not appear until the afternoon, and at that time, offered no explanation for his absence.

507 F.2d at 189 . In United States v. Peterson, the absent defendant had been informed of the trial date at arraignment, and the date and time of trial was expressly noted on his bond, but he did not appear for trial and, at sentencing, offered no explanation for his absence. 524 F.2d at 182-83.

In each of those cases, therefore, the standard for an implied waiver set forth in Tortora was satisfied. Each case involved a defendant at liberty. In each case actual notice of the commencement of trial to the defendant was established by clear and direct proof in the record. Voluntariness was not contested by any defendant.

In the instant case, of course, appellant was in custody and asserted at sentencing that his absence from trial had been involuntary. Further, the portions of the record relied upon by the District Court to support its holding that appellant had actual notice of the commencement of his trial seem ambiguous at best by contrast with the cases discussed above.

Certainly the circumstances relied upon by the District Court, (see pp. 36-37, above), do not support its conclusion that Joseph Wilson knew on December 7, 1972, that his trial was to begin that day. At best, even giving full credit, as the District Court did, to the double hearsay reports to the trial court, appellant knew on December 7, 1972, that he was instructed to appear in court, but not that it was the date set for trial.

Indeed, on the afternoon of the first day of trial, after the hearing on the motion to suppress evidence and after the impanelment of the jury, the trial judge ordered that appellant be instructed to come to court the following morning. In the ensuing colloquy, the trial court made it clear that appellant had not been told that morning that the court appearance that day was trial, and ordered that appellant not be told that evening that his trial had begun in his absence.

The following morning, on the second day of trial, appellant's assigned defense counsel reported to the court that his client had come to the courthouse willingly, and that appellant had told him to "continue trying the case." Counsel's summary of appellant's words were taken literally by the District Court as an indication of appellant's awareness, on that second day, that his trial was in progress. Certainly, the language itself is ambiguous and was not presented to the court by counsel as a direct quote of appellant's words. The phrase "trying the case" could connote

simply representation by counsel rather than conduct of the trial itself. Further, the statement itself was revoked shortly thereafter by Mr. Wilson, again according to counsel, in the general terms: "You are not my lawyer anymore."

More importantly, however, even assuming appellant were told on the second day of trial that his trial was in progress, his refusal to come to the courtroom in handcuffs on that day does not satisfy the requirement that waiver of the right to be present by an incarcerated defendant be express and personal. United States v. Crutcher, 405 F.2d 239, 244 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969); see Argument A, above. Nor does it satisfy the standard for an implied waiver of the right to be present, that appellant "voluntarily, knowingly and without justification" fail to appear.¹⁵ United States v. Tortora, supra, 464 F.2d at 1209. Finally, the events of the second morning of trial, however interpreted, do not constitute a waiver of Mr. Wilson's right to be present during the first day of his trial, when evidence was heard on the motion to suppress and the jury was selected.

The Sixth Amendment right to be present at trial extends to suppression hearings where testimony is to be taken. United States v. Clark, 475 F.2d 240, 246 (2d Cir. 1973);

15. No inquiry was made into Mr. Wilson's understanding that he need not appear in shackles before the jury, although Mr. Wilson's objection to the shackles was that to wear them would violate his constitutional rights.

United States v. Ruiz-Estrella, 481 F.2d 723, 725-26 (2d Cir. 1973); see People v. Anderson, 16 N.Y.2d 282, 286 (1965) (decided under Code of Criminal Procedure §356, now Criminal Procedure Law §260.20). In the instant case, both the identification by the complainant and a five dollar bill seized from Mr. Wilson were the subjects of motions to suppress. The motion to suppress the identification testimony was denied without a hearing, because of the lack of sufficient factual allegations of improper procedures. However, the testimony of the arresting officer at trial suggested that the show-up identification might indeed have been suggested to the complainant, a fact which could have been supplied by Mr. Wilson. A hearing was held on the motion to suppress the five dollar bill, but since Mr. Wilson was the only person who would have been able to rebut the testimony of the police officers, the denial of the motion was a foregone conclusion.

Jury selection is a particularly critical stage of a felony trial, at which the accused's presence is never dispensable. Hopt v. Utah, 110 U.S. 574, 579 (1884). One of the "substantial rights" of an accused is to be brought face to face with jurors while challenges are being made. Lewis v. United States, 146 U.S. 370, 376 (1892).

In this Circuit, a defendant's presence during the impaneling of a jury has been deemed a right so basic to a

fair trial that its violation can never be considered harmless. United States v. Crutcher, 405 F.2d 239, 244 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969); see also, United States v. Toliver, 541 F.2d 958, 964 (2d Cir. 1976);

Indeed, this Court has suggested that a rule requiring "automatic reversal" when a defendant has been denied his right to participate in the jury selection process might be justified, since absence during jury selection prejudices a defendant in ways impossible to determine on an appellate record. United States v. Toliver, supra, 541 F.2d at 964. During voir dire, an accused can exercise his peremptory challenges on the basis of "the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks or gesture of another," a purely personal function for which the legal skill of counsel is no substitute. Lewis v. United States, 146 U.S. 370, 376 (1892), quoted in United States v. Crutcher, supra, 405 F.2d at 244. It is not necessary to belabor the importance of jury selection where a black defendant faces charges which include sexual abuse against a white complainant.

Absence during jury selection deprived Mr. Wilson of a substantial right which, in itself, requires a new trial, even if Mr. Wilson had been present, or had waived his presence, during the remainder of the trial.

However, no waiver of the right to be present at trial can be implied from any description of appellant's statements or actions on the first day of trial, nor on the second day. During the weekend recess and the third day of trial, no inquiry or effort to contact Mr. Wilson was made, although a defense could still have been presented at that time.

At sentencing, appellant stated that he had never been informed of the commencement of trial. That statement is the only direct proof on the record as to whether appellant knew that December 7th was his trial date. At that point, at sentencing, Justice Spector still could have fulfilled his duty to insure that a voluntary and intelligent waiver appeared on the record, if indeed a waiver had been made. Even then, Justice Spector could have received sworn testimony from the correction official(s) and any other person with personal knowledge of the facts. But the trial judge was unwilling to listen then, as he had been before trial.

We didn't just order a verdict against him. He had a full trial ably represented by able counsel. Witnesses testified against him, and the jury chose to believe those witnesses.

(A. 49)

No intelligent and voluntary waiver of Joseph Wilson's right to be present at trial appears on this record, and none can be presumed. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Carnley v. Cochran, 369 U.S. 506, 514 (1962). The "full" trial in absentia thus flagrantly violated Mr. Wilson's rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

C. A competence examination was required to insure a valid waiver of presence at trial under the due process clause of the Fourteenth Amendment to the United States Constitution.

On the morning of trial, Justice Spector was confronted with two related constitutional issues: whether Joseph Wilson's behavior as described by defense counsel created sufficient doubt as to competence to require an examination to determine Mr. Wilson's competence to waive his right to presence under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution; and whether Mr. Wilson's behavior as described by corrections officials and reported by defense counsel and the assistant district attorney supported an implied waiver of the fundamental Sixth Amendment right to be present at one's trial.

The two issues are necessarily considered together, since the denial of the competence examination, taken with the court's decision that Mr. Wilson had waived his right to be present at trial, inevitably constituted a finding that he was capable of making an intelligent and voluntary waiver.

The only person in the courtroom on the morning of December 7, 1972, who had ever had a conversation with Joseph Wilson was Alexander Dreiband, appointed attorney for the defendant. Mr. Dreiband's opinion was that his client should be examined by psychiatrists to determine whether he was competent to be tried or to waive his right to be present at trial.

Mr. Dreiband himself had admittedly had little contact with Mr. Wilson, and had not discussed with his client the possibility of a psychiatric examination. The basis for Mr. Dreiband's opinion was that Mr. Wilson had directed counsel to file writs for six other prisoners at the Tombs, told counsel that he (Mr. Wilson) was God, expressed a desire to try his own case and violently over-reacted to a touch on the arm by a courtroom attendant, three days earlier.

Justice Spector had also been informed by others that Mr. Wilson held irrational religious beliefs, which perhaps emanated from his divine self-image. He had received word the day before trial that Mr. Wilson was observing Channukah, a Jewish holiday. Assistant district attorney Heller had been told on the morning of trial that Mr. Wilson was celebrating a Muslim holiday. Mr. Wilson had said he was Protestant when he was arrested.

The assistant district attorney's opposition to the motion for a competence examination was founded on observations of the defendant. Mr. Heller characterized Joseph Wilson as a "malingerer," a person who is "always lucid in court," who has no psychiatric history,¹⁶ and whose actions were not those of an "insane man."

16. At sentencing, however, the trial judge received more complete information from the pre-sentence report submitted by the probation department. The report, based on a 1963 report of appellant, stated that Mr. Wilson furnished conflicting information about his early life, had been discharged from the Army as "emotionally unstable," with a "character or behavior disorder," had been on his own since he was fourteen years old and suffered from emotional deprivation and an unstable home life.

An accused's occasional lucid demeanor in court cannot be relied upon to dispense with the due process requirement of a competence examination. Pate v. Robinson, 383 U.S. 375, 386 (1966); People v. Peterson, 40 N.Y.2d 1014, 1015 (1976). Demeanor in court is a particularly unreliable indicator of competence where the demeanor was not personally observed by the trial judge.

Further, it is not disputed that Mr. Wilson was irrational at his most recent court appearance, on December 4, 1972.

Assistant district attorney Heller's remarks therefore did not rebut the evidence of pronounced irrational behavior, and could not properly be deemed dispositive on the issue of Mr. Wilson's competence. Pate v. Robinson, supra.

Mr. Dreiband's opinion, on the other hand, was apparently accorded no probative value, although this Court has ruled that defense counsel's views on the need for a competence examination should be given weight. United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1096 n.8 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973); United States ex rel. Roth v. Zelker, 455 F.2d 1105 (2d Cir.), cert. denied, 408 U.S. 927 (1972). See also United States v. David, 511 F.2d 355, 360 (D.C.Cir. 1975), ("[C]ounsel's first-hand evaluation of a defendant's ability to consult on his own case and to understand the charges and proceedings against him may be as valuable as an expert psychiatric opinion on his competency.")

However, quite apart from whether Mr. Dreiband had provided the trial court a factual basis sufficient to require an examination into Mr. Wilson's ability to stand trial, the descriptions of Mr. Wilson's behavior should reasonably have raised doubts about his mental capacity to make an intelligent waiver of fundamental rights.

Where the issue of competence is coupled with the waiver of a fundamental trial right, the courts have been particularly solicitous about requiring a competence examination. The threshold for a competence examination is lower where the issue is waiver of a trial right, than where it is merely the ability to aid counsel in trial.

Thus, a defendant who wishes to waive his right to counsel and conduct his own defense, after having received a hearing on the issue of his competence to stand trial and having been found to be fit, is entitled to a separate hearing into the issue of his competence to waive a fundamental constitutional right. Westbrook v. Arizona, 384 U.S. 150 (1966). Certainly no additional inquiry would be necessary unless the standard for competence to waive a fundamental right were less than the standard for competence to stand trial, a standard which had already been met by the defendant in Westbrook. See also Seiling v. Eymann, 478 F.2d 211, 214 (9th Cir. 1973) ("[W]here a defendant's competency has been put in issue, the trial court must look further than the usual 'objective criteria in determining the adequacy of a constitutional waiver.'")

In United States v. Saddler, 531 F.2d 83, 87 (1976), this Court held that, where the trial court has information at sentencing that an accused may lack the mental capacity to proceed with sentencing and may have lacked the capacity to plead guilty earlier, an examination should be ordered to ascertain the defendant's capacity to proceed with sentencing and the examination should be "expanded" to determine the defendant's competence to plead. The Saddler decision quotes with approval the higher standard for competence to plead guilty than for competence to stand trial used in the Ninth Circuit: the defendant must have the mental capacity to make a "'reasoned choice' among the alternatives presented." 531 F.2d at 86, quoting from Seiling v. Eyman, supra, 478 F.2d at 215. See also United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976).

It is not necessary for this Court to decide the appropriate standard of competence for waiver of a constitutional right in the instant case, which presents only the question whether the facts presented to the trial judge were sufficient to raise a doubt as to Joseph Wilson's capacity to waive his right to be present at trial.¹⁷ However, the

17. New York Criminal Procedure Law provides that an order of examination be issued whenever the court is "of the opinion that the defendant may be an incapacitated person." §730.30.

threshold for ordering a competence examination must, like the standard of competence itself, relate to the gravity of the decision facing an accused. Sailer v. Gunn, 548 F.2d 271, 275 (9th Cir. 1977).

Although this Court ruled in both United States ex rel. Curtis v. Zelker, supra, and United States ex rel. Roth v. Zelker, supra, that a competence examination of the defendant was not required before accepting the guilty plea, the defendant in each of those cases had previously been examined and found competent, and their lawyers' opinions were that they were competent. On the other hand, Joseph Wilson had not previously been examined when his lawyer, the person in the best position to know his ability to "assist in his own defense, told the court that, in his opinion, Mr. Wilson might not be competent. More importantly, the waiver of rights in the instant case was implied on the basis of descriptions of Mr. Wilson, rather than personally expressed in open court, like a guilty plea. The safeguards taken by courts to insure the competence of a guilty plea therefore were non-existent in the instant case; yet the consequences of Mr. Wilson's behavior were as serious as a decision to plead guilty, since the right to be present at trial is "scarcely less important to the accused than the right of trial itself." Diaz v. United States, supra, 223 U.S. at 455.

The trial judge's decision to proceed to trial in absentia, on the basis of an implied waiver of Mr. Wilson's Sixth Amendment right to presence, without ordering the competence examination requested by defense counsel, or at the least making some further inquiry into Mr. Wilson's capacity to waive a fundamental right, was an abrogation of its responsibility to insure that there was, in fact, an intelligent and competent waiver. Johnson v. Zerbst, 304 U.S. 458, 465 (1938); Curry v. Estelle, 531 F.2d 766, 768 (5th Cir. 1976).

D. Even if a waiver of the right to be present at trial can be implied where the accused is in custody, and even if no competence examination were required to determine appellant's competence to waive a fundamental right, the trial court abused its discretion in proceeding to trial in absentia.

This Circuit has established stringent rules to protect a defendant's right to be present at trial. Under the decision in United States v. Tortora, 404 F.2d 1202 (2d Cir.), cert. denied, 409 U.S. 1063 (1972), a trial judge has no discretion to proceed in the absence of a defendant, even assuming the absence is voluntary and that the defendant had actual notice of the commencement of trial, except in those "extraordinary" circumstances where the public interest in proceeding outweighs the interest of the defendant in being present at trial. Id., at 1210; United States v. Toliver, 541 F.2d 958, 964 (2d Cir. 1976).

There was no public interest, as defined in Tortora, in proceeding in absentia in the instant case.¹⁸ After a measurably short delay, the trial could have taken place in Mr. Wilson's presence, or in his absence if he desired, but with some form of express, personal waiver on the record; there were no co-defendants and no risk of multiple trials; no witness was in jeopardy. 404 F.2d at 1210; See also United States v. Peterson, 524 F.2d 167, 185 (4th Cir. 1975), cert. denied sub nom. Smith v. United States, 424 U.S. 925 (1976).

On the other hand, Mr. Wilson's interest in personally defending himself at trial was not tempered by the countervailing considerations discussed in cases where the absent defendant is free on bail, such as the uncertainty and delay in apprehension under a bench warrant.¹⁹ Taylor v. United States, 414 U.S. 17, 20 (1973); Tortora, supra, at 1208.

There was no justification in the instant case for the court's decision to proceed in absentia -- no conceivable

18. The Tortora court suggests that, unless the trial involves multiple defendants, the balancing test will never tip in favor of proceeding in absentia. 404 F.2d at 1210, n.7.

19. The District Court inverted the reasoning of Tortora by holding, in a footnote, that the Tortora factors do not apply where a defendant is in custody. Obviously, the policy considerations articulated in Tortora apply with even greater force when the absent defendant is in custody, since the major public problem of delay in location and apprehension of the absent defendant does not exist in these cases.

reason for unnecessarily rushing to trial. Mr. Wilson was in custody; the delay could not benefit him. Defense counsel was admittedly ill-prepared, having had little productive contact with his client. There was reason to believe that Mr. Wilson was not competent to waive his fundamental trial rights.

The circumstances of the instant case virtually eliminated the discretion of the trial judge to proceed in absentia under the Tortora reasoning. Even if a waiver of the right to be present could have been implied, therefore, the court's decision to proceed with the entire trial in absentia was error requiring a new trial.

CONCLUSION

The waiver of the right to be present at trial in the instant case is unique in that it has been upheld through the application of principles of implied waiver, which ordinarily are applicable only when the absent defendant is at liberty on bail. The instant case is also unique in that the implied waiver has been upheld despite the lack of direct proof that the appellant knew this trial was to begin on December 7, 1972, and in the face of appellant's assertion that he was never informed that his trial was to begin on that day nor that it had begun and was continuing. The trial court's denial of defense counsel's motion for a competence examination of appellant before trying him in absentia further invalidates the implied waiver here.

All of the authorities cited in the foregoing argument demand that appellant's conviction, the product of a trial in absentia after a waiver of the right to presence was implied by the trial court without insuring that the waiver was voluntary and intelligent, be overturned and that the writ of habeas corpus be granted.

Respectfully submitted,

AMANDA POTTERFIELD
PIERCE GERETY, JR.
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Petitioner-Appellant
100 Church Street + 18th Floor
New York, New York 10007
(212) 285-0370

Dated: New York, New York
September 12, 1977

COPY OF THE WITHIN PAPER
RECEIVED
DEPARTMENT OF LAW

NEW YORK CITY OFFICE
ATTORNEY GENERAL

COPY OF THE WITHIN PAPER
RECEIVED
DEPARTMENT OF LAW

SEP 12 1977

NEW YORK CITY OFFICE

ATTORNEY GENERAL

County B